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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

11 MARIA LAZOS, et al,
12 Plaintiff,
13 vs.
14 CITY OF OXNARD, et al,
15 Defendant
16 TOMAS BARRERA SR

Case No. CV 08-02987 RGK (SHx)

**PLAINTIFFS' MOTION IN LIMINE
NO. 11 TO EXCLUDE IMPROPER
EXPERT OPINIONS**

Date: August 11, 2009
Time: 9:00 a.m.
Courtroom: 850

16 TOMAS BARRERA, SR.
17 Plaintiff,
18 vs.
19 CITY OF OXNARD, et al,
20 Defendants.

22 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

23 Plaintiffs, MARIA LAZOS and TOMAS BARRERA, SR., individually and as
24 representatives of the ESTATE OF TOMAS BARRERA, hereby move this Court for
25 an order excluding Defendants' expert from offering improper expert opinions. This
26 motion is made under Fed. R. Ev. 401, 402, 403 and 703, and is further based on the
27 attached Memorandum of Points and Authorities, the pleadings and papers on file in
28 this action and upon such of argument and evidence as may be presented prior to or

1 at the hearing of this motion.

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3 Dated: June 23, 2009

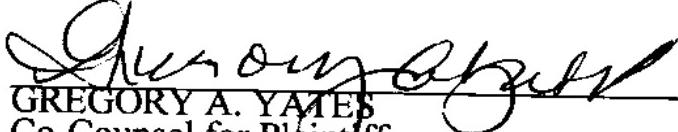
LAW OFFICES OF GREGORY A. YATES, P.C.

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GREGORY A. YATES
Co-Counsel for Plaintiffs,
TOMAS BARRERA, SR., individually and as a
Personal Representative of THE ESTATE OF
TOMAS BARRERA, JR.

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Dated: June 26, 2009

LAW OFFICES OF JENNY SCOVIS

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JENNY SCOVIS
Counsel for Plaintiff,
MARIA LAZOS, individually and as a Personal
Representative of THE ESTATE OF TOMAS
BARRERA, JR.

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MEMORANDUM OF POINTS AND AUTHORITIES

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**THE COURT MAY EXCLUDE AN EXPERT'S OPINION WHERE BASED
UPON SPECULATION, CONJECTURE AND/OR IMPROPER MATTERS**

F.R.E. 702 limits an expert opinion to those subjects that are beyond the competence of persons of common experience, training and education. See Beech v. Aircraft Corp. V. U.S., 51 F.3d 834, 841-42 (9th Cir. 1995) (trial court had discretion to exclude an expert opinion regarding what was contained on an inaudible tape recording, because the subject matter was not beyond the expertise of the jury); U.S. v. Langford, 802 F.2d 1176, 1179-90 (9th Cir. 1986) (trial court did not abuse its discretion by excluding proposed expert testimony regarding the reliability of eyewitnesses, on the basis that the opinion would not assist the jury.) As a general principle, expert opinions may be excluded where based on improper matter and are not shown to be reliable. Daubert v. Merrel Dow Pharm., Inc., 509 U.S. 579, 589-90 (1993) (trial court faced with proposed scientific testimony or evidence must ensure that the evidence is relevant and reliable.) An expert may not base his or her opinion on speculation or conjecture. See Cabrera v. Cordis Corp., 134 F.3d 1418, 1422-23 (9th Cir. 1998) (experts were properly excluded as unreliable when their opinions represented unsupported and untested conclusions); Gray v. Shell Oil Co., 469, F.2d 742, 749-50 (9th Cir. 1972 (expert's opinion that was speculative and not supported by the evidence, was properly excluded.) Furthermore, expert opinions that are based upon inadmissible hearsay may be excluded.

23 The following opinions of Defendants' experts, Dr. Lewinski and Jared
24 Zwickey, as expressed in their expert reports attached hereto as **Exhibits "A"** and
25 **"B,"** are based on speculation, conjecture and improper matters, and should therefore
26 be excluded.

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1 A. DR. LEWINSKI'S PROFFERED TESTIMONY

2 Pg. 4, top paragraph ("[t]he bullet path pattern is consistent with Mr. Barrera
 3 turning through the plane of gunfire as was described by Officer Salinas") - Dr.
 4 Lewinski is making a credibility determination and is evading the province of the
 5 jury.

6 Pp.4-5, opinions nos. 1, 2, 3, 6 and 7 are based on "our research" and "other
 7 sources" and "the research of others" and are, therefore, based on speculation and
 8 conjecture, inadmissible hearsay and are unreliable to the extent they are premised
 9 upon studies conducted by others.

10 Pp. 4-5, opinions nos. 4, 5, 6, 7 and 8 - these opinions are all based on
 11 speculation, conjecture and unreliable studies, as far as Dr. Lewinski's studies on
 12 "turning subject" have not been proven to be reliable.

13 Pg. 5, opinion 8 ("Mr. Barrera, who had a knife in his right hand, apparently
 14 released the knife as he was turning and being shot by Sgt. Salinas") is speculative,
 15 and invades the province of the jury. To the extent Dr. Lewinski is making a factual
 16 determination, is opinion is improper. It is for the jury, and not for Dr. Lewinski, to
 17 make credibility determinations and to decide which set of facts it believes.

18 B. JARED L. ZWICKEY PROFFERED TESTIMONY

19 All of Mr. Zwickey's opinions are improper since they are all based on
 20 credibility determinations, taking into account only Salinas' version of the events, and
 21 not even considering Plaintiffs' version. Mr. Zwickey proffered testimony invades
 22 the province of the jury and should be excluded *in its entirety*.

23 Furthermore, the following opinions are improper for the reason stated herein
 24 below:

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1 Pg. 6, 1st paragraph - by assuming the facts and circumstances "as presented by
 2 Sergeant Salinas and the witnesses are correct," and by basing his opinions "only on
 3 the police version of the facts," Mr. Zwickey invades the province of the jury. It is
 4 for the jury, and not for Mr. Zwickey, to make credibility determinations and to
 5 decide which set of facts it believes.

6 Pg. 6, paragraph under "Facts and Circumstances" - the opinion invades the
 7 province of the jury as far as it is based only on Defendants', and not Plaintiff's
 8 version. Mr. Zwickey's opinion that Salinas' conduct was reasonable under the
 9 circumstances is improper, unless it is based on facts and circumstances that are
 10 introduced into evidence.

11 Pg. 8, 3rd paragraph (in my professional opinion there was sufficient probable
 12 cause...) - whether or not there was probable cause to believe that Tomas Barrera was
 13 committing a felony is for the jury and the court to decide, and not a matter of expert
 14 opinion.

15 Pg. 9, 1st paragraph under "Opinion" - whether or not Mr. Barrera knew or
 16 should have known he was being pursued by an officer is for the jury to decide, and
 17 should not be the subject of expert opinion. Further, by opining that Mr. Barrera had
 18 a duty to refrain from using a weapon, Mr. Zwickey implies wrongly that he had a
 19 weapon and invades the province of the jury. His opinion that Mr. Barrera "had a
 20 duty to refrain from using force or any weapon..." invades the province of the jury
 21 and the court.

22 Pg. 10, 1st paragraph under "Opinion" - Mr. Zwickey invades the province of
 23 the jury by concluding that Salinas responded "appropriately." His opinion is further
 24 based on Salinas' version only, and is thus speculative and improper as it invades the
 25 province of the jury as to Salinas' credibility.

26 Pg. 11, 2nd paragraph ("Mr. Barrera knew that he was going to assault Sergeant
 27 Salinas") is speculative, invades into the province of the jury.
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1 Pg. 11, 3rd paragraph ("Mr. Barrera committed battery against the sergeant")
 2 invades the province of the jury and the court - "when he threw an Allen-wrench at
 3 him and then displayed a knife" - speculative, invades the province of the jury - "and
 4 assaulted the sergeant" - speculative, invades the province of the jury and the court.
 5 "There is no doubt in my professional opinion that the intent of this assault was to
 6 cause Sergeant Salinas serious bodily injury or death" - invades the province of the
 7 jury, not the proper subject of expert opinion.

8 Pg. 11, 5th paragraph ("Mr. Barrera armed himself with a fixed bladed knife")
 9 invades the province of the jury. The last paragraph ("The cutting power of a ...
 10 knife, similar to the weapon used by Mr. Barrera to assault Sergeant Salinas") invades
 11 the province of the jury as to whether or not Mr. Barrera had a knife and as to whether
 12 or not he assaulted Salinas.

13 Pg. 12, 1st and 2nd opinions ("Mr. Barrera was in control of the situation and
 14 could have ended the foot chase at any time if he had stopped and submitted to
 15 arrest"; "Mr. Barrera's reckless conduct illustrates how desperate he was to avoid
 16 arrest, even if it meant injuring or killing a peace officer") are speculative and invade
 17 the province of the jury. The 3rd opinion (Barrera's actions constituted a criminal
 18 assault with a deadly weapon, which put Salinas at serious risk of serious bodily
 19 injury) invades the province of the court and jury. The 4th opinion (Salinas
 20 reasonably believed that his life was in immediate jeopardy; Barrera left Salinas with
 21 no other reasonable alternative but to use deadly force) invades the province of the
 22 jury. Last opinion (any reasonable officer faced with the same similar facts would
 23 have reasonably believed the use of deadly force was reasonable) invades the
 24 province of the jury and is based on improper matter as far as it is based on Salinas'
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1 version only and does not take into account Plaintiffs' version.

2 Pg. 14, under "opinion" (the use of force was in accordance with Salinas'
 3 department policy and training etc' and state and federal statutes and case law)
 4 invades the province of the jury and the court. 5th paragraph (the attempt to pursue
 5 and arrest Barrera was reasonable and the use of force was reasonably necessary)
 6 invades the province of the jury. His statement that "government officials are not
 7 required to err on the side of caution" invades the province of the jury and court, and
 8 misstates the law on used of deadly force, which is governed by the reasonableness
 9 standard. 6th paragraph (if an officer is threatened with great bodily injury or death
 10 with a weapon, as was Salinas) invades the province of the jury as to whether or not
 11 Salinas was indeed so threatened. The opinion that Salinas "reasonably believed"
 12 that he had to use deadly force to stop Barrera invades the province of the jury. The
 13 last paragraph in its entirety ("the reasonableness inquiry in an excessive force claim
 14 is an objective one...") invades the province of the court. It is for the court, and for
 15 experts, to instruct the jury on how to decide excessive force cases.

16 Pg. 16, 4th paragraph (Mr. Barrera should have reasonably known he was
 17 resisting a peace officer and that he had a legal obligation to comply with his orders)
 18 invades the province of the jury and further constitutes credibility determination as
 19 far as Salinas' version that he ordered Barrera to stop contradicts the witnesses'
 20 version that no orders/warnings were given prior to the shooting.

21 Pg. 16, paragraph under "Opinion" (Barrera was under the influence of a
 22 dangerous and restricted drug") - invades the province of the jury based on improper
 23 matter since there is no evidence that suggests Barrera was under the influence of any
 24 drugs. Further, Mr. Zwickey is a police practice consultant and is not qualified to
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1 render opinions on the affects of drugs and the state of mind of a person under the
2 influence.

3 Pg. 16, last paragraph - Mr. Zwickey is a police practice consultant and is not
4 qualified to interpret the toxicology reports.

5 Pg. 17, entire page - Mr. Zwickey is a police practice consultant and is not
6 qualified to render opinions on the affects of drugs on human behavior.

7 Pg. 18, paragraph under "opinions" (the amount and type of force used by
8 Salinas was reasonable) invades the province of the jury and is further improper
9 opinion as far as it is based on Salinas' version of the events only and does not take
10 into account Plaintiff's version.

11 Pg. 18, 2nd paragraph (Salinas used only the amount and type of force allowed
12 by the Oxnard PD) invades the province of the court. Excessive force cases are
13 judged by "reasonableness" standard and not by the standards allowed by the OPD.
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15 Pg. 18, 3rd paragraph (there is no requirement for law enforcement officers to
16 use all feasible alternatives to avoid a situation where deadly force can justifiably be
17 used) invades the province of the court.

18 Pg. 18, 4th paragraph (there are cases which support the assertion that where
19 deadly force is otherwise justified there is no constitutional duty to use non-deadly
20 force) invades the province of the court. His opinion that "the use if deadly force by
21 Sergeant Salinas... under the facts and circumstances presented in this matter, was
22 reasonable and necessary" invades the province of the jury and is further based on
23 improper matter as far as it is only based on facts as circumstances presented by the
24 Defendants (based on Mr. Zwickey's statement in the beginning of his report that his
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1 opinions are based only on the police version of the facts).

2 Pg. 18, 5th paragraph (it was reasonable for Salinas to discharge his weapon
3 when Barrera's level of resistance elevated from resistive to a violent life-threatening
4 resisting) invades the province of the jury. His opinion that “[w]hen a higher degree
5 of risk to a peace officer or to the public exists, a greater use of force is justified”
6 invades the province of the court and misstates the law.

7 Pg. 19, 1st paragraph (while it makes since for criminal law purposes to
8 consider whether the criminal uses the force with the purpose of causing death or
9 serious bodily injury, the question is whether the officers actions are objectively
10 reasonable) - invades the province of the court.

11 Pg. 19, 2nd paragraph (Salinas reasonably believed that Barrera intended to
12 inflict great bodily injury or death; the perceived threat was imminent; having reason
13 to believe his life was in immediate danger; Salinas fired his weapon to stop the
14 threat; when the threat was diminished Salinas stopped shooting) is speculative,
15 constitute credibility determination and invades the province of the jury.

16 Pg. 19, 3rd paragraph (when Barrera fell to the ground Salinas heard what he
17 thought was the fixed bladed knife) is speculative, constitute credibility determination
18 and invades the province of the jury and is not the proper subject of expert opinion.

19 Pg. 19, 4th paragraph (55 seconds after Salinas made a radio transmission that
20 he was going to investigate a suspicious circumstance, he contacted the police
21 dispatcher to notify he was involved in a shooting; the dispatcher immediately
22 broadcasted the information and notified medical emergency personnel) is
23 speculative, constitute credibility determination and invades the province of the jury
24 and is not the proper subject of expert opinion.

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1 Pg. 19, 5th paragraph (when Barrera fell to the ground Salinas handcuffed him;
2 while he was handcuffing him Mora and Purnell arrived) is speculative, constitute
3 credibility determination and invades the province of the jury and is not the proper
4 subject of expert opinion.

5 Pg. 19, 6th paragraph (Ventura County Criminalistic Laboratory reported that
6 Barrera's DNA was found on the knife; the evidence clearly shows that Barerra was
7 the sole person in possession of the knife) is speculative, constitute credibility
8 determination and invades the province of the jury and is not the proper subject of
9 expert opinion. It further invades the province of the court on which evidence to
10 admit.

11 Pg. 19, 7th paragraph - what Barrera say or did not say, and what witnesses
12 overheard him say or not say, invades the province of the jury and is not the proper
13 subject of expert opinion.

14 Pg. 20 - entire page - as a police practice expert, Mr. Zwiekey is not qualified
15 to render such opinions. Further, in as far as his opinion is based on research and
16 seminars conducted by others, it is based on hearsay and is unreliable.
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II.

CONCLUSION

19 Based on the above, it is respectfully requested that the Court exclude
20 Defendants' expert from offering the above stated improper expert opinions.

21 In the alternative, it is respectfully requested that the Court conduct a hearing
22 outside the presence of the jury, pursuant to F.R.E. 103 and 104 to determine
23 admissibility of the experts' testimony.
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2 Dated: June 23 2009

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Dated: June 26, 2009

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